

Rafferty (Migration) [2023] AATA 110 (6 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Patrice Paulann Rafferty
CASE NUMBER:	2206788
HOME AFFAIRS REFERENCE(S):	BCC2021/1943480
MEMBER:	Christine Kannis
DATE:	6 January 2023
PLACE OF DECISION:	Perth
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Statement made on 06 January 2023 at 7:51am

CATCHWORDS

MIGRATION – cancellation – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – relationship ceased before visa grant – applicant sponsored and married another person – disputed timing of the genuine and exclusive relationship – applicant's career in the childcare industry – impact on employer – contribution to the community – mental health issues – support for wider family – decision under review set aside

LEGISLATION

*Migration Act 1958, ss 5(1), 97-105, 107-109, 140, 189, 359
Migration Regulations 1994, r 2.41*

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 801 (Spouse) visa under s 109(1) of the *Migration Act 1958* (Cth) (the Act).
2. The delegate cancelled the visa on the basis that the applicant did not comply with s 104 of the Act. The issue in the present case is whether those grounds for cancellation are made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 6 December 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's partner, Mr Bincar Sibuea and the applicant's cousin, Ms Keri Rafferty. The Tribunal was assisted by an interpreter in the Indonesian and English languages.
4. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss 101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
6. The exercise of the cancellation power under s 109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s 107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s 107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
7. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s 107 and that the notice issued under s 107 complied with the statutory requirements. In making this determination the Tribunal notes that on 9 March 2022 the Department sent the applicant an email advising that it needed to send her important correspondence and requested that she provide her current address and email address. On 9 March 2022, the applicant replied by email and provided her current address and email address. The s 107 notice dated 9 March 2022 was sent to the applicant at the email address provided.

Was there non-compliance as described in the s 107 notice?

8. The issue before the Tribunal is whether there was non-compliance in the way described in the s 107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled.
9. The non-compliance identified and particularised in the s 107 notice was non-compliance with s 104. Section 104 provides:
 10. Changes in circumstances to be notified

11. (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.

12. (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.

13. (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.

14. (4) Subsection (1) applies despite the grant of any visa.

15. Therefore, s 104 of the Act imposes a duty on non-citizens to inform the Department if a relevant change in circumstances causes an answer in their visa application form to be incorrect before the visa is granted.

16. The non-compliance identified in the present matter was that the applicant failed to notify the Department that her relationship with her former partner, Mr Kurt Tenio, had ended before the grant of her Partner (Permanent) Subclass 801 visa on 9 April 2020.

17. Delegate's decision

18. The evidence of non-compliance particularised in the s 107 notice was follows:

- On 4 December 2017, the applicant lodged an application for a Partner Subclass 820/ 801 visa with Mr Tenio as her sponsor. She answered Yes to questions about whether the relationship with her sponsor was genuine and continuing and whether they have a mutual commitment to a shared life to the exclusion of all others. On 31 May 2018, the applicant was granted a Partner (Temporary) Subclass 820) visa.
- On 8 January 2020, the applicant submitted a "*Partner visa application – information for permanent stage processing*" form which provided information for the assessment of her Partner (Permanent) Subclass 801 visa application including:
 - On page 8, under the heading "*Relationship*", the applicant answered Yes to the question: "*Is the applicant still in a genuine and continuing relationship with the sponsor?*".
 - On page 9, under the heading "*Current relationship*", the applicant answered Yes to the question: "*Do the applicant and the sponsor have a mutual commitment to a shared life as a married couple, or as de facto partners to the exclusion of all others?*".
- The applicant failed to notify the Department that her relationship with Mr Tenio, ended (at the latest) in December 2018 before the grant of her Partner (Permanent) Subclass 801 on 9 April 2020. This change of circumstances caused the answers provided on her "*Partner visa application – information for permanent stage processing*" as set out above to become incorrect.

19. The s 107 notice set out the following subsequent information received by the Department:

- On 1 September 2020, Mr Bincar Sibuea lodged an application for a Partner Subclass 820/ 801 visa with the applicant as his sponsor and his spouse.

- In an accompanying statement, the applicant said she first met Mr Sibuea on 12 September 2018 in Indonesia. On 14 October 2018, she returned to Indonesia, and Mr Sibuea and a friend collected her and her friend from the airport. She said during this holiday she created a strong friendship with Mr Sibuea. However, in April 2019 he began a relationship with her friend, Morgan. Another friend, Sophie, sponsored him on a Visitor Subclass 600 visa to Australia in May 2019. She said Mr Sibuea returned to Bali on 25 July 2019 and again travelled to Australia in September 2019 to continue his relationship with her friend. She said her friendship with Mr Sibuea continued to develop. In December 2019, she travelled to Scotland to spend Christmas with her family. She said her relationship with Mr Tenio ended on 17 April 2020 after months of uncertainty about the relationship. She said her relationship with Mr Sibuea began on 25 April 2020, they committed to a de-facto relationship to the exclusion of all others on 1 May 2020 and on 24 July 2020 they married.

20. The s 107 notice set out the following adverse information:

- Information on Instagram appears to indicate that the applicant and Mr Sibuea commenced a relationship earlier than claimed based on:
 - A photo posted in December 2018 depicts the applicant and Mr Sibuea, where Mr Sibuea comments, *"You always make me strong for everything what happened to me (sic), I'm so sorry I'm not perfect. Not romantic then little bit silly (smiling emoji)"*. A contact of his posted, *"We can't wait to meet her next time we're in Bali!"*, which suggests more than a friendship between the applicant and Mr Sibuea existed. Departmental records indicate that the applicant departed Australia on 11 December 2018 and returned from Indonesia on 6 January 2019.
 - A photo posted in December 2020 in which Mr Sibuea comments, *"Happy anniversary 2 years xx I love you (kissing emoji)"* to which the applicant commented, *"Love u lots & lots (heart emojis)"*.
- Given the information in these posts, it appears the applicant's relationship with Mr Sibuea commenced in approximately December 2018.
- The applicant's Facebook recorded that her relationship with Mr Sibuea began on 18 December 2019. This information has since been removed from her social media profile.
- In Western Australia, in order to be married at the Perth Registry Office, it is necessary to book at least one month prior to the intended date of marriage. This means that if the applicant and Mr Sibuea established a de facto relationship on 1 May 2020 as stated, in order to be married on 24 July 2020, they would have decided to marry within six weeks. This timeframe raises credibility concerns as to when the relationship commenced.
- On his arrival to Australia on 2 May 2019, Mr Sibuea listed the applicant as his emergency contact on his Incoming Passenger Card despite the contention that he was pursuing a relationship with the applicant's friend, Morgan.
- The applicant travelled on the same flight to Bali with Mr Sibuea on 25 July 2019.

- In her accompanying statement, the applicant said her relationship with Mr Tenio was uncertain in early 2020 and in March 2020 he moved back home with his mother to support her during COVID-19.
21. Given the information regarding the applicant's relationship with Mr Sibuea from 2018, 2019 and 2020, the delegate decided her relationship with Mr Tenio was not genuine and continuing to the exclusion of all others, prior to the grant of her Partner (Permanent) Subclass 801 visa on 9 April 2020.

22. Response to the s 107 notice

23. On 23 March 2022, the applicant responded to the s 107 notice and provided documentation which included but was not limited to:

- Representative's written submission dated 23 March 2022
- Applicant's statutory declaration dated 22 March 2022 in which she said she and Mr Tenio fell out of love slowly and in March 2020 he moved out of their apartment and back to his mother's house. She said they spoke from time to time and tried to make things work but there was no official date the relationship ended. Their relationship was genuine until the grant of her Subclass 801 visa.
- Undated statement from Mr Tenio in which he confirmed that he and the applicant were in a de facto relationship "for the duration of her 801 partner visa"
- Marriage Certificate issued by the Western Australia Registry of Births, Deaths and Marriages showing the applicant and Mr Sibuea married on 24 July 2020
- Residential Tenancy Agreement dated 15 May 2018 indicating the applicant and Mr Tenio as tenants
- Residential Tenancy Agreement renewal dated 21 May 2020 indicating the applicant and Mr Sibuea as tenants
- ANZ Bank letter dated 21 March 2022 confirming the applicant and Mr Tenio's joint account was closed 1 May 2020
- Applicant's Year 12 Certificate dated 3 December 2015, Certificate IV in Education Support dated 23 November 2016 and Diploma of Early Childhood Education and Care dated 26 January 2022
- Applicant's Employment Reference letter (undated) from Ms Karen Dowley identified as the Area Manager of Indigo Montessori Child Care and Kindy and the applicant's supervisor since 24 September 2020
- Applicant's Employment Agreement dated 3 February 2022 with the Patricia Giles Centre for Non-Violence (PGCNV) for the position of Support Worker
- Applicant's payslip from Mulberry Tree Childcare and Kindy dated 22 February 2022
- Applicant's Curriculum Vitae
- Applicant's National Police Certificate dated 10 February 2022 issued by the WA Police

- Statutory declaration dated 12 March 2022, made by a friend and colleague of the applicant, Ms Robyn McPherson, in which she attests to the applicant being hardworking, trustworthy and loyal
- Statutory Declaration dated in March 2022, made by the applicant's aunt, Ms Joyce Rafferty, in which she attests to the applicant's good character and the impact on her and her family if the applicant is required to depart Australia
- Statutory Declaration dated 15 March 2022, made by the applicant's cousin and work colleague, Ms Keri Rafferty, in which she attests to her close relationship with the applicant, the applicant's good character and the impact on her and her children if the applicant is required to depart Australia
- Letter dated 16 March 2022, from Ms Morgan Paige Thorne-Baston, stating that she sponsored Mr Sibuea for a Tourist visa in August 2019 and they were in a relationship for a short period of time before agreeing to be friends

24. The representative's written submission, dated 23 March 2022, provided the following information:

- The applicant met Mr Sibuea in Bali on 9 September 2018. She travelled to Bali again in October and December 2018 and in January, February, April, July and December 2019.
- In March 2020, Mr Tenio moved out of the home he shared with the applicant.
- On 17 April 2020, the applicant's relationship with Mr Tenio ended.
- On 1 May 2020, the applicant and Mr Tenio closed their joint account.
- On 25 April 2020, the applicant and Mr Sibuea commenced a relationship and on 1 May 2020, they commenced cohabitation.
- On 5 May 2020, the applicant and Mr Sibuea opened a joint account.
- On 21 May 2020, Mr Sibuea was added to the applicant's rental lease.
- The delegate was wrong to rely on the fact that in March 2020 Mr Tenio moved in with his mother to support her during COVID-19 to conclude his relationship with the applicant ended prior to 9 April 2020.
- The applicant's relationship with Mr Tenio was genuine and ongoing when her Subclass 801 visa was granted as supported by his signed statement, the fact that they were named as tenants on a rental lease and that their joint bank account was not closed until 1 May 2020.
- The delegate noted the short timeframe of 6 weeks to decide marriage on 24 July 2020 would indicate earlier commencement of relationship. The determination of marriage in a short timeframe is not unreasonable.
- The applicant relies on two grounds for determination that a de facto relationship with Mr Tenio existed at the time of Subclass 801 was granted: De facto partners don't need to live together and the "quality" of the relationship is not a relevant consideration for the Partner visa.

- The applicant has a strong connection with Australia and does not feel she belongs in the United Kingdom. A BBC article by Kate Mayberry says “People on long-term foreign assignments often find it hard to adjust once they return home. Many leave their company within a few years, and some leave the country entirely”. According to psychologist Nicola McCaffrey, long absences can play havoc with a person’s sense of identity, a feeling that is intensified by the length of time away and how often they visit home. Some long-term expatriates cannot adjust to life in their old home and struggle with reverse culture shock.
- The applicant has a successful career primarily in the childcare industry. She has been employed by Mulberry Tree/Indigo Montessori since September 2020. The childcare system is at risk of collapse due to the economic impact of COVID-19. The applicant is making a contribution to the recovery of Australian economy through her employment. She has made a substantial contribution to the Australian community since 2017 when she commenced work in the child care sector.
- The applicant is also working as a Support Worker at PGCNV, a refuge for women seeking safe accommodation after experiencing domestic violence.
- Cancellation of the applicant’s visa will adversely affect Mulberry Tree Childcare and Kindy and PGCNV.
- Cancellation of the applicant’s visa will adversely affect Mr Sibuea’s Partner visa application because the sponsorship cannot be approved.
- Cancellation of the applicant’s visa will adversely affect her aunt’s family in Australia. The applicant sees them on regular basis and is close to them.

Evidence provided prior to the hearing

25. Prior to the hearing the applicant provided statutory declarations, a written statement and supporting documentation. The representative also provided a further written submission and supporting documentation. Much of the evidence provided in response to the s 107 notice was repeated. Accordingly, the Tribunal has not included repetitive evidence in detailing the evidence provided prior to the hearing.
26. In a statutory declaration dated 20 November 2022, the applicant provided the following evidence:
 - She has lived in Australia since she was 9 years old and has no life elsewhere.
 - She has concerns for her social, financial and cultural wellbeing should she be made to depart Australia. These are detailed in her *Detrimental concerns for my wellbeing* statement. She has concerns for her mental wellbeing and has been diagnosed with anxiety and panic disorder and cancellation of her visa will cause her severe hardship.
 - Australian children in her family will be affected should she depart Australia and Ms Keri Rafferty will provide this evidence.

- Her ties to the community include her volunteer work and her employment in two critical sectors. She is involved in Australian community groups as evidenced by a letter from Yoshua Simorangkir, Chairman of Punguan Batak Perth.
- The Department's assumptions in relation to Mr Sibuea's social media post shows a lack of acceptance of cultural differences. His Instagram post referring to not being romantic did not mean they were intimate at that time. Due to his limited English, Mr Sibuea uses the word romantic to mean nice, beautiful or kind. She provided him with support when his uncle passed away and the post was to show his gratitude for her support and kindness. The Department failed to understand people with English as a second language. In Indonesian culture it is normal to show love, affection and appreciation to males and females who are good friends. Therefore, the post did not mean she and Mr Sibuea were boyfriend and girlfriend in December 2018.
- The 2 year anniversary Instagram post should not have been taken literally due to Mr Sibuea's limited English and difficulties understanding the meaning of anniversary. He meant it had been 2 years since they met and he loved her from 2018 when they became good friends..
- Social media should not be used as an accurate or factual source of information. The Department allege she removed information on social media after it contacted her. The information was removed weeks after contact by the Department because she felt overwhelmed with anxiety and privacy violation. PGCNV later requested employees in a face to face role with clients to set their social media profiles to private for safety and confidentiality reasons.
- She acknowledges that she and Mr Sibuea married soon after commencing a relationship however when two people from different countries fall in love during a pandemic with the possibility of a long separation, marriage is a comforting way of avoiding separation.
- The Department's decision means she cannot sponsor Mr Sibuea's Partner visa and therefore he will lose the opportunity to build a better life, and they will not be able to continue their plans of having children in a safe and wealthy country. Cancellation of her visa means she is affected by Public Interest Criterion 4013 with no other pathways, other than being forced to depart her home to an unknown destination where she will face wellbeing deterioration and hardships.

27. In her *Detrimental concerns for my wellbeing should I be made to return to the United Kingdom or Indonesia* statement dated 26 October 2022, the applicant provided the following information:

- She arrived in Perth in 2007 and completed her schooling in 2015 when she graduated with a Certificate 3 in business. She continued her studies at TAFE from 2016 to 2017 and obtained Certificates in Education Support. In 2022 she obtained a Diploma of Early Childhood and Care.
- Her employment, family and social connections are in Australia and she considers Australia her home.
- She has been diagnosed with anxiety and panic disorder and is concerned that if she leaves her support network, she will not get the same level of care elsewhere. She lost her father in June 2021. She visits his special places in Perth and it would be devastating to be forced to leave these special places. She fears for her emotional, social and physical wellbeing if she is made to return to the United Kingdom.

- She is employed in two essential services and this demonstrates she is a valued member of the Australian community. She has worked and paid tax in Australia since she was 18. She is a Relief Manager at Mulberry Tree Childcare & Kindy centres and covers managers' sick days and holiday leave. This role is crucial to the organisation and it would be a great loss if she is made to depart Australia.
- She has always wanted to help her community and provide support to people during hard times. She works as a Support Worker at PGCNV on a part-time basis, providing assistance to women at risk of harm or death from domestic violence. These vulnerable clients would be impacted if her visa is cancelled because she would not be able to continue to support them.
- Regarding her difficulties if returning to Scotland:
 - It would be traumatic for her to leave the country she calls home. She does not have a life in the United Kingdom and does not share their culture or interests and would not be able to integrate successfully. She has no friends in Scotland and leaving 15 years of childhood friendships in Australia would cause her significant heartbreak. Having no social connections or friends would worsen her depression.
 - She would suffer hardship finding employment in the United Kingdom due to having no employment history or references from there. She would have to pay international student fees to attend university. Mr Sibuea would not have a visa and therefore they would be separated indefinitely. She is not close to her extended family in Scotland and they would not provide her with financial or emotional support.
 - Her only connection to the United Kingdom is her mother and her sister who live in 2 bedroom house. There would be nowhere for her to sleep and this would add to a deterioration in her wellbeing. There is a lack of rental properties in Port Glasgow and she would struggle for rental approval having no rental history in Scotland. Her struggles finding employment would result in her not being able to afford rent if a property was available. She may end up homeless and fears for her emotional, social and physical wellbeing if she is forced to returned to the United Kingdom. She is concerned about the high possibility that she will face homelessness, unemployment, extreme mental illness and financial hardship.
- Regarding her difficulties if she and Mr Sibuea return to his home country of Indonesia:
 - She has no ties to Indonesia in relation to employment, friendships, family or cultural understanding. They would have nowhere to live as Mr Sibuea's family live in a 1 bedroom house.
 - Mr Sibuea's family do not speak English which creates a barrier for communication because she does not speak Indonesian. She is concerned that she would be seen as an outcast in his village because she cannot communicate in their language. She would face cultural difficulties having a strong Catholic faith in Indonesia, which is a predominantly Islamic country.
 - She would find it difficult to engage in employment due to not speaking Indonesian.

- She would be concerned for her mental wellbeing due to the lack of support and mental health stigma in Indonesia. She would be concerned about her overall health in Indonesia due to poor sanitation and cleanliness conditions. Indonesia had the fifth highest rate of lost life years because of particulate pollution. She would be exposed to air pollution concentrations making her at risk of losing her life.
- She is terrified that her life will come to an end if she is forced to move to poverty stricken Indonesia or to the United Kingdom to start her life again with no social support or connections and without her husband. She wishes to continue her safe and healthy life in Australia where she can remain a valued member of the community and continue her employment caring for Australian children and supporting vulnerable adults.

28. The following supporting documentation was also provided:

- Extract (undated and source not indicated) stating: *The human cost of air pollution in Indonesia is shocking: the 2015 haze caused upward of 75,000 cases of upper respiratory infection. Moreover in 2010 a study found that 57.8% of the population of Jakarta suffered from various diseases related to air pollution including bronchial asthma, bronchopneumonia, and coronary artery diseases.*
- Article dated 2021, from the International Journal of Mental Health Systems, titled *Types of stigma experienced by patients with mental illness and mental health nurses in Indonesia: a qualitative content analysis*. The article was based on a study undertaken at Indonesia's largest psychiatric hospital and the study participants were 15 patients and 15 nurses. The study confirmed that stigmatization of mental illness in Indonesia is, similar to other countries, complex and multiple dimensional phenomena impacting individuals, families, organisations and society.
- Document with heading Poverty & Equity Brief Indonesia, dated October 2022, which states that unemployment declined in 2022 however has not yet returned to pre-pandemic level
- Undated Rightmove website screenshot showing 3 properties for rent in Port Glasgow
- Letter dated 26 October 2022, from the applicant's mother, Ms Sharon Rafferty. Ms Rafferty provided information in relation to the applicant's mental health and employment; the potential adverse financial and emotional consequences to the applicant if she relocates to Scotland; the rental market in Scotland and the possibility of the applicant becoming homeless; the difficulties the applicant would face in obtaining further education in Scotland; the applicant's lack of a social network in Scotland; the applicant's relationship with members of her extended family in Australia; the death of her husband and her inability to provide the applicant with emotional support due to her own grief; the difficulties the applicant would face due to separation from Mr Sibuea because he would not have a visa to enter Scotland and her fears if the applicant relocates to Indonesia. The information provided by Ms Rafferty was not materially different in relation to these matters from the information provided by the applicant in her statutory declaration and in her *Detrimental concerns for my wellbeing should I be made to return to the United Kingdom or Indonesia* statement.

- Undated GP Mental Health Care Plan (one page only) Patient Assessment which refers to a diagnosis of severe anxiety and panic attacks
- Letter dated 28 September 2020, from Emergency Department Royal Perth Hospital to Cambridge Medical Practice in relation the applicant's symptoms including palpitations
- Letter dated 12 October 2020, from Cambridge Medical Practice to Dr Paul Glendenning, referring to management of the applicant's medical conditions and noting these may be Addisitions, Cushings or POTS
- The applicant's Diploma of Early Childhood Care and Education dated 26 January 2022

29. In a statutory declaration dated 20 November 2022, Mr Sibuea provided the following evidence:

- His relationship with the applicant started on 25 April 2020 and he married her on 24 July 2020.
- He met the applicant in September 2018 when she was in Bali for a holiday. He asked for her Instagram name and when he added her he saw she had a partner in Perth. He respected that and so he was just friends with her.
- The applicant returned to Bali in October 2018 with two friends and he looked after them like a tour guide. The applicant celebrated lots of her Australian friends' birthdays in Bali in 2018 and 2019 and he helped with transport and day tours.
- He made good friends with the applicant and her friends in 2019.
- Regarding his Instagram post in December 2018, he said the applicant made him strong and he was sorry he was not perfect and not romantic because on 12 December 2018, his uncle died and the applicant supported him. He used Google translate for the caption. He did not know what romantic meant and was trying to say he is not good at showing emotions for the support she provided, not romantic as a boyfriend. This did not mean they were in a relationship. In his culture they show love and respect to friends like a family even if they are boy or girl.
- His friend Sophie sponsored him to visit Australia in 2019 and he was in a relationship with another friend, Morgan, who sponsored him for a Tourist visa in 2019.
- He named the applicant on his Incoming Passenger Card when he arrived in Australia because she picked him up from the airport as Morgan was working.
- Regarding the photo posted on Instagram in December 2020, and his statement, Happy anniversary 2 years xx I love you, he meant that they had known each other for 2 years friendship. This did not make sense because he is still learning English. He is sorry if his broken English and culture confused the Department.
- If the applicant's visa is cancelled then his visa will be refused and he will lose the opportunity to build a better life in Australia and help his parents in Sumatra.

- He and the applicant have nowhere to live if her visa is cancelled. He is worried about the applicant's mental health if she has to go to Indonesia because she cannot speak Indonesian and Indonesia does not support people who have mental health problems. They will have no financial support because his family are poor and they will have no jobs to support themselves. He would have to work in a tattoo shop and earn \$150 a month and the applicant could not get a job because she cannot speak the language. He cannot support himself, the applicant and his family with this money. He has been poor with no money living in Sumatra for most of his life. He is scared if he has to go back to being poor and hardship again.
- He is working as a concrete labourer in Perth and works hard and pays tax.

30. In an undated written statement, made by the applicant's cousin, Ms Keri Rafferty, the following information was provided:

- She arrived in Australia with her parents and sister in 1997. The applicant's parents relocated to Australia in 2007 and she was thrilled to have her aunt, uncle and cousins living here. They enjoyed many family celebrations and the applicant's parents were a constant source of support for her.
- In 2014, she had her first child and the applicant and her parents cared for him when she returned to part-time work. The applicant is 'aunty' to her 3 children and she is a significant presence in their lives having provided childcare many times and being present at their milestones. The lack of extended family in Australia means her children place substantial weight on their relationship with the applicant. She fears they will be devastated if the applicant leaves Australia and she will also face hardship due to the applicant not being able to assist her in caring for her children.
- In 2016, the applicant's parents and sister returned to live in Scotland. She was devastated to lose this source of support but relieved the applicant stayed. Another aunt also returned to Scotland in 2016 making the applicant remaining here more meaningful. This aunt (and the applicant's aunt) passed away in 2016 and the family relied on each other for emotional support at that time.
- Following the applicant's separation from Mr Tenio in 2020, she began a relationship with Mr Sibuea and he was welcomed into the family. He has had a positive impact on their lives including her children and has adopted an uncle role. There would be a detrimental impact on her, her family and the applicant if the applicant is forced to leave Australia.
- The applicant's father passed away in 2021. The applicant travelled to Scotland to attend the funeral and returned to Australia and completed the mandatory quarantine. This is evidence of her determination to return to the place where she feels most supported. Her own father is comforted by the applicant's presence in Australia because it allows him to maintain a connection with his brother. Their family is proud of the applicant for honouring her father's wishes by remaining in the country he loved and they honour his life, together with the applicant, by visiting places he loved in Perth.
- She is aware of the impact the passing of the applicant's father and cancellation of her visa has had on the applicant's mental health. The applicant has sought support from her and her family to help with her grief, trauma and diagnosis of anxiety and panic disorder. She is concerned that the applicant's mental health will decline if she is forced to leave Australia and her support network. She does not believe the

applicant's mother could provide emotional support because she has her own mental health challenges.

- She is employed as a refuge worker at PGCNV. The applicant also works there and plays an imperative role in strengthening relationships between staff and families, especially children. Her contribution is invaluable and the organisation would suffer a great loss if the applicant is forced to leave Australia.

31. A written submission dated 23 November 2022, from the representative was also provided. A significant volume of documentation was attached the submission. Many of the documents were duplicates of documents provided by the applicant. In addition, the representative provided documentation which included but was not limited to the applicant's Employment Contract with PGCNV dated 28 July 2022.

32. Evidence at hearing

33. The Tribunal referred the applicant to the evidence before it which contended that she and Mr Tenio tried to make it work before ending the relationship and asked her about how they tried. She told the Tribunal that after Mr Tenio moved out of their apartment in March 2020, they remained in daily contact. She said they would often meet after work and have dinner. She said they were arguing a lot and then making up a couple of days later. The applicant said she also caught Mr Tenio sending intimate messages to other girls on Snapchat. She was unable to recall when she saw the Snapchat messages.
34. In response to asking what caused the relationship to end on 17 April 2020, the applicant said she couldn't cope with the arguments and was becoming too stressed.
35. The Tribunal referred the applicant to the undated written statement made by Mr Tenio. She said it was made in March 2020. In the statement Mr Tenio provided his phone number. The Tribunal told the applicant that it would like to contact Mr Tenio and ask him about the end of their relationship and in particular what he meant when he stated he was in a de facto relationship with the applicant "for the duration of her 801 partner visa". She said she was not comfortable with the Tribunal contacting him. She said she had not told him that her visa had been cancelled.
36. The Tribunal noted that the applicant travelled to Bali 9 times between September 2018 and December 2019 and that she was in Bali on New Year's Eve 2018. The Tribunal asked her whether Mr Tenio accompanied her on any of the trips. She said he preferred to stay in Australia and work or play golf.
37. The Tribunal noted that the applicant travelled to Scotland at Christmas in 2019 and asked whether Mr Tenio accompanied her. She said he did not go to Scotland with her because he was not willing to take time off work and wanted to play golf.
38. The applicant told the Tribunal that she met Mr Sibuea in September 2018 in Bali when he was working in a tattoo shop and as a tour guide. She said they became good friends. In relation to the Mr Sibuea's reference on social media to not being romantic, she said he used the Google translator app and misused the word. Mr Sibuea gave consistent evidence to the Tribunal in this regard. He also said he was referring to a friendship with the applicant.
39. The applicant told the Tribunal that when she and Mr Sibuea commenced their relationship on 25 April 2020, he was living with her friend Morgan in Clarkson and also with his friends in Cockburn. In contrast to this, when asked where he was living on 25 April 2020, Mr Sibuea initially told the Tribunal that he was living in Mandurah. When the Tribunal put the applicant's evidence to him he said he was living with Morgan.

40. The Tribunal referred the applicant to her concerns for her wellbeing should she be made to return to the United Kingdom or Indonesia as set out in her statement dated 26 October 2022. The applicant contended that if her visa is cancelled, she fears for her mental wellbeing. The Tribunal referred to the one page of a Mental Health Care Plan which had been provided and pointed out that it was not dated and no treatment details were shown. She said she was diagnosed with severe anxiety and panic disorder in September 2019. She said she attended a psychologist twice in 2020. She said she was prescribed two anti-depressant medications however she did not like the side effects and so she now manages her mental health on her own. The Tribunal pointed out that there was no evidence of her current mental health and based on her oral evidence, she had received limited treatment in 2020 and 2021.
41. In her statement the applicant referred to not being able to integrate successfully in Scotland because she does not share the same culture or interests. The Tribunal asked her to clarify this statement. In response she said she would have no social connections in Scotland because all her friends are in Australia. The Tribunal notes that the applicant's mother and sister live in Scotland and accordingly gives this limited weight.
42. In her statement the applicant referred to suffering hardship finding employment in the United Kingdom. The Tribunal asked her whether she had undertaken searches to ascertain her employment prospects in the United Kingdom. In response she said she had not undertaken much research and accordingly the Tribunal gives this contention limited weight.
43. In her statement the applicant referred to having to pay international student fees to attend university. The Tribunal asked her to clarify this statement. In response she said she wants to study psychology but would not be able to afford to do so in Scotland. The Tribunal gives this some weight.
44. In her statement the applicant referred to the high possibility of facing homelessness. The Tribunal asked her whether she could sleep on her mother's couch or floor if she could not find accommodation in Scotland. She said she could sleep on the floor. At this point in the hearing the applicant queried the reason for discussing her possible return to Scotland and said she doesn't intend living separately to Mr Sibuea and if she is required to depart Australia they will live together in Indonesia. In contrast to this, Mr Sibuea told the Tribunal that if the applicant is required to depart Australia, their relationship will break because they will have to conduct a long distance relationship. The Tribunal gives minimal weight to the applicant's contention that she will face homelessness in Scotland.
45. In her statement the applicant referred to the cultural differences she would face in Indonesia. The Tribunal asked her to clarify this statement. In response she said she does not speak the language and the main religion is Islam. The Tribunal gives this some weight.
46. The Tribunal referred the applicant to the information provided prior to the hearing regarding air pollution in Indonesia and an article about mental health stigma in Indonesia. She said in Indonesia stigma is attached to people who suffer from anxiety. The Tribunal pointed out that the article referred to patients in hospital under psychiatric care.
47. The Tribunal asked the applicant about any hardship she or her family members may suffer if her visa is cancelled. She said she will suffer hardship because she has lived in Australia for 15 years and she has family and all her friends here. She said if she has to depart Australia she will have to start again with no social connections. She said she is still grieving the loss of her father who passed away last year and still visits places which hold special memories of him in Australia. She said if she has to depart Australia she will lose the ability to visit those places.

48. The applicant said Ms Keri Rafferty and her aunt and uncle will suffer hardship if she is required to depart Australia because they would lose another member of the family while they are still grieving the loss of their uncle and brother (her father). The applicant said Ms Keri Rafferty and her children will suffer hardship if she is required to depart Australia because she would not be able to provide her assistance with child care. The Tribunal gives this some weight.
49. The applicant said Mr Sibuea will suffer hardship if she is required to depart Australia because he has built a better life in Australia and has been able to send his family money. She said he will lose the opportunity for a better life if her visa is cancelled.
50. Mr Sibuea told the Tribunal that if the applicant is required to depart Australia, it will affect their future and their plans to have a family. He said his economic situation in Indonesia is poor and while he has been in Australia he has been able to send money to his family. In response to the Tribunal asking how they supported themselves prior to him coming to Australia, he said his parents are farmers and supported themselves from their farm. The Tribunal accords this evidence no weight.
51. Ms Keri Rafferty told the Tribunal that she is an Australian citizen and her children aged 8 years, 6 years and 3 years are also Australian citizens. She said in 2021 her family lost her father's brother (the applicant's father) and in 2019 they lost her father's sister. She said it would be another loss for their family if the applicant is required to depart Australia. Ms Keri Rafferty became emotional when giving this evidence.
52. Ms Keri Rafferty said if the applicant is required to depart Australia, she would lose the applicant's help in looking after her children. She said her husband is a FIFO worker and the applicant helps her with child care once a month and from time to time at other times. She said her children are very close to the applicant and they have also formed a close bond with Mr Sibuea. She said they would feel a deep loss if the applicant was not part of their lives.
53. Ms Keri Rafferty told the Tribunal that she is concerned for the applicant's mental health if she is required to depart Australia. She said that she has witnessed the applicant's mental health struggle and has attended Emergency Departments with her and provided emotional support. Ms Keri Rafferty said she does not believe the applicant's mother could provide the emotional support she needs.

Non-disclosure certificate

54. The Department file contained a certificate issued under s 375A of the Act. If a certificate is validly issued under s 375A of the Act, the Tribunal must do all that is necessary to ensure the document or information the subject of the certificate is not disclosed to any person.
55. To be valid, the certificate must specify a public interest reason for non-disclosure, the information must meet the description of being against the public interest to disclose and the certificate must be signed. The Tribunal provided a copy of the certificate to the applicant and informed her that it considered the certificate to be valid and invited her to comment on the validity. No submissions were made during or following the hearing disputing the validity of the certificate.
56. The certificate stated that disclosure of the information would be contrary to public interest because it would disclose or enable a person to ascertain the existence or identity of a confidential source of information and where information was provided 'in confidence', the provider of the information had not consented to the disclosure of the information to the applicant.

57. The Tribunal advised the applicant that while it accepted the public interest was not served by the actual release of the information, it considered that in the interests of procedural fairness she had a right to be informed of the 'gist' of the information and that it would put the information to her for her comment or response. Utilising the procedure under s 359AA of the Act, the Tribunal put to the applicant that the information protected in this case included information obtained as a result of investigations made by the Department. The Tribunal noted that the information was discussed by the delegate in the Decision Record.
58. The Tribunal put to the applicant that Departmental records showed that she and Mr Sibuea departed Australia on 25 July 2019 on the same flight. In response she said it is not illegal to travel together on the same flight. She said they were friends at the time.
59. The Tribunal put to the applicant that a screenshot was provided of her Facebook page which showed, in relation to 'Details about Patrice', that she wrote, *In a relationship with Bincar Fernando Sibuea Since 18 December 2019*. In response she did not deny that she posted the information however she said she did not think about all the dates she wrote on Facebook, and in relation to 18 December 2019, she wasn't thinking about the literal date,
60. The Tribunal put to the applicant that Mr Sibuea's Incoming Passenger Card dated 2 May 2019 lists her as his Emergency contact in Australia. In response she said he did this because she picked him up from the airport. In contrast to this, when the Tribunal asked Mr Sibuea about this he initially said he wrote down the applicant's name because she was the closest of his friends in Australia. When the Tribunal pointed out that in his statutory declaration he said it was because Morgan was working and the applicant picked him up, he then said this was the reason for writing the applicant's name on the Incoming Passenger Card.

Post hearing evidence

61. Following the hearing the applicant provided:
- Medical Certificate from her GP which referred to the applicant attending the practice from July 2020 until May 2021 in relation to mental health issues
 - Second page of a Mental Health care Plan, dated 12 August 2020, which indicated the treatments to be psychotherapy, relaxation techniques and medications
 - Evidence of contact with Psychology Today regarding an enquiry about making an appointment (undated)
 - Evidence of contact with Psychology Health Care regarding an enquiry about making an appointment dated 2020
 - Evidence of contact with Vision Counselling regarding making an enquiry about an appointment dated 2020
 - Evidence of contact with Perth Psychology Collective regarding an enquiry about making an appointment dated 2020
 - Evidence of contact with Pamela Woods regarding an enquiry about making an appointment dated 2020
 - Email from Headspace dated 18 December 2016 to the applicant referring to her saying she was experiencing a hard time without her family

- Evidence that the applicant attended an appointment time with Relationships Australia on 12 May 2022
- Evidence of contact with the Employee Assistance Program (undated)
- Evidence of the applicant being prescribed Valdoxan in 2020 and Sertraline in 2020 and 2021
- Messaging between the applicant and third parties which refers to the applicant's anxiety

62. The post hearing evidence shows that the applicant received some psychological assistance in 2020 and was prescribed medication in 2020 and 2021. No medical reports were provided and therefore the Tribunal has no evidence before it as to the nature, causes and severity of any mental health condition she suffered in 2020 and 2021. Similarly, confirmation that she attended an appointment with Relationships Australia on 12 May 2022 does not provide any information about the reason for her appointment. For this reason, the Tribunal gives the medical evidence limited weight in relation to the applicant's mental health in the past. The messaging evidence is not medical evidence and the Tribunal gives it minimal weight. There was no current evidence in relation to the applicant's mental health.

63. Conclusion on non-compliance

64. The Tribunal accepts that the applicant and Mr Tenio remained as tenants on a lease until May 2020 and they did not close their joint bank account until 1 May 2020. The applicant's evidence was that Mr Tenio moved out of the rental premises they shared in March 2020 and the Tribunal gives little weight to the fact that he remained on the lease. There was no evidence before the Tribunal as to whether the applicant and Mr Tenio both continued to use the joint account prior to closure and the Tribunal gives this little weight.

65. The Tribunal noted that Mr Tenio's written statement referred to being in a de facto relationship with the applicant "for the duration of her 801 partner visa". The meaning of this statement was not clear to the Tribunal and the applicant told the Tribunal she would not be comfortable with it contacting him for clarification. Further, she said she has not told Mr Tenio that her visa had been cancelled. This is concerning given that his written statement was provided to support her application for review. For these reasons the Tribunal gives Mr Tenio's statement minimal weight.

66. The Tribunal does not accept the applicant's evidence that Mr Sibuea's limited English language skills caused him to incorrectly use the word 'romantic'. In his social media post Mr Sibuea said he was sorry he was not 'romantic'. In her statutory declaration dated 20 November 2022 she said:

Bincar has often used the word 'romantic' to describe a song, place or person that he thought was 'nice' 'beautiful' or 'kind'. This does not mean he was in intimate relationship with every person he deemed as romantic.

67. The applicant's contention that Mr Sibuea used the word 'romantic' when he meant to use words such as 'nice', 'beautiful' or 'kind' would mean that he was apologising for not being nice, beautiful or kind. This interpretation is not accepted.

68. The Tribunal accepts that constant cohabitation is not in itself a requirement for a de facto relationship. An assessment of a relationship includes an assessment of whether parties have a mutual commitment to a shared life together to the exclusion of others. In this case, despite the applicant's claim that she was committed to Mr Tenio to the exclusion of all

others up until 17 April 2020, the evidence demonstrates that she was in a romantic relationship with Mr Sibuea from at least 18 December 2019. In making this determination the Tribunal places significant weight on the Facebook post which updated the applicant's details to include this information. The Tribunal does not accept the applicant's explanation that when she posted this information she did not think about all the dates she wrote on her Facebook page and she wasn't thinking about the literal date.

69. The Tribunal also accepts that some relationships develop within a short time and this does not in itself mean that the applicant and Mr Sibuea were in a romantic relationship prior to the claimed date of 1 May 2020. However, when considered with the applicant's frequent trips to Bali in 2018 and 2019 after she met Mr Sibuea, the timing and the content of the Instagram and Facebook posts, the fact that Mr Sibuea listed the applicant as his emergency contact on his Incoming Passenger Card in May 2019, the fact that the applicant travelled on the same flight to Bali with Mr Sibuea on 25 July 2019, this is significantly outweighed by these matters. The Tribunal gives weight to these matters as being indicative that the applicant and Mr Tenio did not have a mutual commitment to a shared life together to the exclusion of others when her Partner (Permanent) Subclass 801 visa was granted on 9 April 2020.
70. The Tribunal finds on the evidence that prior to the visa grant, the applicant did not inform the Department that her relationship with Mr Tenio had ended. For these reasons, the Tribunal finds that there was non-compliance with s 104 by the applicant in the way described in the s 107 notice.

Should the visa be cancelled?

71. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s 107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s 109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s 109(2).
72. In exercising this power, the Tribunal must consider the applicant's response to the s 107 notice and have regard to any prescribed circumstances: ss 109(1)(b) and (c). The prescribed circumstances are set out in reg 2.41 of the *Migration Regulations 1994* (Cth) (the Regulations).
73. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that are relevant in any given case: *MIAC v Khadji* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers' which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.
74. The Tribunal has taken the reg 2.41 prescribed circumstances as well as any other relevant facts and matters, including the applicant's responses to the s 107 notice, into account when considering the discretion.

Prescribed circumstances

The correct information

75. For the reasons outlined above, the Tribunal is satisfied that the applicant's de facto relationship with Mr Tenio ended prior to the grant of the Subclass 801 visa and she failed to notify the Department. The correct information was that when her Subclass 801 visa was granted, the applicant was not in a genuine and continuing relationship to the exclusion of all

others with Mr Tenio. The correct information was not provided because the applicant did not notify the Department of the change in her circumstances.

76. The Tribunal gives this weight in favour of its discretion to cancel the visa.

The content of the genuine document (if any)

77. This consideration does not apply in this case.

78. *Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document*

79. For the reasons explained above, the Tribunal has concluded that prior to the applicant's Subclass 801 visa being granted, the relationship with Mr Tenio had ceased to exist. The cessation of that relationship is of direct relevance to the grant of the visa. Although it is not necessary to establish that the visa would not have been granted if the correct information was known, had the correct information been known, the Subclass 801 visa would not have been granted. The Tribunal is satisfied that the decision to grant the visa was based, wholly or partly, on the incorrect information.

80. The Tribunal gives this factor weight in favour of its discretion to cancel the visa.

The circumstances in which the non-compliance occurred

81. The applicant contended that her relationship with Mr Tenio did not end until 20 April 2020 and that there was no non-compliance. For the reasons outlined above, the Tribunal is satisfied that the evidence demonstrates that prior 20 April 2020 she and Mr Tenio did not have a mutual commitment to a shared life together to the exclusion of others.

82. The Tribunal is satisfied that the applicant's non-compliance was deliberate as she would have been aware that such a significant matter would have adversely impacted her Partner visa. In making this determination the Tribunal takes into account the matters outlined above including the applicant's objection to the Department's use of information on social media and her removal of information adverse to her claims.

83. The Tribunal gives this factor significant weight in favour of its discretion to cancel the visa.

The present circumstances of the visa holder

84. The applicant has lived in Australia for 15 years, arriving in Australia in 2007.

85. The applicant and Mr Sibuea have been married for 2 years and 6 months. The applicant told the Tribunal that they live in rental premises and currently have a 12 month lease ending in September 2023.

86. The applicant told the Tribunal that she is working at Mulberry Tree Childcare and Kindy 5 days per fortnight and that she works at PGCNV for the remainder of her time. She commenced at Mulberry Tree Childcare and Kindy in September 2020 and at PGCNV in January 2022.

87. A letter dated 25 October 2022 from Ms Leanne Polletta of Mulberry Tree Childcare & Kindy was provided which advised that the applicant is currently employed by the organisation and is working at all locations as a Support Manager. Ms Polletta said the industry has faced staffing shortages and more than ever since the pandemic they have relied heavily on their

Support Managers. She said Support Managers play a vital role in the running of the services and the applicant's commitment to her job is evident throughout her employment and it would be a loss to the organization should her visa application be denied.

88. A letter dated 24 October 2022 from Ms Julie McCulloch, General Manager, Programs and Clinical Services at PGCNV was provided which said the applicant is a key member of the service, providing emotional and practical support to women and children affected by family and domestic violence. Ms McCulloch said the applicant is hard working and her commitment as a support worker provides vital support in a difficult to recruit sector and she would be a loss to the organisation should her visa application be unsuccessful.
89. The applicant has extended family in Australia and Ms Keri Rafferty gave evidence as to the closeness of their relationship and the applicant's relationship with her children.
90. The Tribunal gives this factor significant weight against exercising its discretion to cancel the visa.

The subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act

91. Nothing adverse is known about the applicant's subsequent behaviour concerning her obligations.
92. The Tribunal gives this consideration a little weight against cancelling the visa.

Any other instances of non-compliance by the visa holder known to the Minister

93. There is no evidence that the applicant has otherwise breached the obligations under the Act or that there are other instances of non-compliance.
94. The Tribunal gives this consideration a little weight against cancelling the visa.

The time that has elapsed since the non-compliance

95. The applicant did not notify of a change in her circumstances prior to her Subclass 801 visa being granted on 9 April 2020. Two years and 10 months have passed since the grant the visa. The Tribunal has found that the applicant's relationship with Mr Tenio ceased prior to 9 April 2020. In the Tribunal's view, the evidence strongly indicates that the applicant no longer had a commitment to a shared life with Mr Tenio to the exclusion of others from at least 18 December 2019. Therefore, at least 3 years has elapsed since the non-compliance and the Tribunal acknowledges this is a lengthy period.
96. The Tribunal gives this factor a little weight against cancelling the visa.

Any breaches of the law since the non-compliance and the seriousness of those breaches

97. There is nothing before the Tribunal to indicate that the applicant has breached the law in Australia since the non-compliance was determined.
98. The Tribunal gives this factor a little weight against cancelling the visa.

Any contribution made by the holder to the community

99. The evidence before the Tribunal was that the applicant contributes to the community through her employment in critical sectors and her volunteer work.

100. The applicant has worked in the child care sector since 2017. She has completed a number of courses in Australia including a Diploma in Early Childhood Care and Education. She also works with victims of domestic violence in her work with PGCNV. A letter dated 21 October 2022 from Ms Cath McGregor of PGCNV was provided which stated that the applicant volunteered for activities on 27 September 2022 and 14 October 2022 and that she is a valued member of the team.
101. The Tribunal accepts that the applicant is an active member of the Punguan Batak Perth community. A letter dated 18 October 2022 from the Chairman stated that the applicant and Mr Sibuea have been involved with the community since 2020 and that the applicant volunteers in the children's room and that all the children adore her. Screenshots of messages between the applicant and Silvana Siregar dated October (year unspecified) requesting the applicant assist in the Kids room during a Christmas event and the applicant's response agreeing to assist were provided.
102. The Tribunal accepts the applicant provides child care assistance to Ms Keri Rafferty.
103. The applicant has also provided supporting statements from family members and friends demonstrating that she has formed close community ties and describing her care for others.
104. On the evidence the Tribunal is satisfied that the applicant has made contributions to the Australian community.
105. The Tribunal gives this factor some weight against cancelling the visa.
106. The Tribunal is of the view it has given genuine consideration to the prescribed circumstances in reg 2.41 where they are relevant or applicable in this case.

Other considerations

107. As noted, the prescribed circumstances are not exhaustive. The Tribunal has considered the following additional matters that under policy should be taken into account, where relevant, in relation to the discretion to cancel a visa under s.109.

Whether there would be consequential cancellations under s.140

108. The Tribunal is not aware that there are any persons in Australia whose visas would be impacted if the applicant's visa is cancelled.

109. Whether there are mandatory legal consequences, such as whether the person would become unlawful and liable to detention and removal, whether detention is a likely consequence of the cancellation decision and if so, for how long, and whether there are provisions in the Act which prevent the person from making a valid application for any visa without the Minister personally intervening.
110. In her statutory declaration the applicant referred to being affected by Public Interest Criterion 4013 if her visa is cancelled. The Tribunal is mindful that a cancellation could lead to the applicant becoming an unlawful non-citizen who could be detained and removed from Australia pursuant to s 189. The Tribunal is mindful that a visa cancellation could mean that the applicant might face difficulties in being granted further visas in Australia and that she could also be subject to a 3 year exclusion period unless she meets the relevant Public Interest Criterion. Whilst these are serious consequences, the Tribunal does not give them weight in favour of not cancelling the visa because they are the intended consequences of cancellation.

Whether any international obligations, including non-refoulement and best interests of the children as a primary consideration, would be breached as a result of the cancellation

111. The applicant is a citizen of the United Kingdom and has made no claim for a protection visa. There is no evidence and no suggestion that removal of the applicant would lead to a breach of Australia's non-refoulement obligations.
112. Article 3 of the *Convention on the Rights of the Child* (Convention) requires that in all actions involving children, the best interests of the child shall be the primary consideration. In this case, the applicant said her cousin's children would be adversely affected. The children's mother, Ms Keri Rafferty, provided similar evidence. The Tribunal considered whether to cancel or not cancel the applicant's visa would be in the children's best interests. The applicant and Ms Keri Rafferty said the applicant regularly assists with care of the children and she has a close relationship with them. The Tribunal accepts this evidence. The Tribunal is mindful that Ms Keri's Rafferty's evidence was that the applicant assists with child care once a month and from time to time at other times. In the Tribunal's view, notwithstanding their close relationship, the children's interests would not be significantly affected due to the limited time the applicant spends with them.
113. The Tribunal gives this factor no weight either in favour of its discretion to cancel or not cancel the visa.

Any other relevant matters, including the degree of hardship that may be caused to the visa holder and any family member

114. The applicant has lived in Australia since 2007. She has established friendships in Australia and has studied and worked in Australia. She is 24 years old and therefore she has spent most of her life in Australia. The Tribunal and gives this some weight against cancelling the visa.
115. The applicant told the Tribunal that if her visa is cancelled, she and Mr Sibuea will lose the opportunity to build a life together in Australia. She said she will not live apart from Mr Sibuea and she has fears for her physical and mental wellbeing if she lives in Indonesia. The Tribunal accepts that the applicant may face stigma in Indonesia in relation to her mental health and gives this some weight against cancelling the visa.
116. The applicant said she will also face language, employment and financial difficulties in Indonesia. The Tribunal accepts that the applicant would face these difficulties but does not consider that they are hardships which could not be overcome. No evidence was provided to substantiate the contention regarding employment difficulties and the Tribunal is aware that there is an Australian expatriate community in Bali. The Tribunal put this to the applicant and she conceded she was aware of this also.
117. Although the applicant's oral evidence to the Tribunal was that she would not return to Scotland, the written evidence and Ms Keri Rafferty's evidence was that the applicant would face hardship in relation to homelessness, employment, study and emotional support if she returned there. No evidence was provided to substantiate the contention regarding employment difficulties and the applicant conceded that if necessary, she could sleep on her mother's floor. The Tribunal accepts Ms Keri Rafferty's evidence in relation to her belief that the applicant's mother would not provide the emotional support needed and gives this evidence some weight.
118. Ms Keri Rafferty told the Tribunal that she and her children would suffer hardship if the applicant was required to depart Australia. The Tribunal accepts this evidence and gives it some weight against cancelling the visa.

119. The Tribunal accepts that if the applicant's visa is cancelled, she will not be able to sponsor Mr Sibuea in his Partner visa application and therefore it will be refused. The Tribunal accepts that this will cause Mr Sibuea hardship as it is unlikely he will be able to remain in Australia and continue working and gives this some weight against cancelling the visa.
120. The evidence before the Tribunal included evidence from the applicant's current employers that she is a valued employee and if she is not able to continue her employment it would be a loss to their respective organisations. The Tribunal gives this some weight against cancelling the visa.

Conclusion on the exercise of the discretion

121. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal has found that there are grounds for cancelling the visa because the applicant did not comply with s 104 of the Act.
122. The Tribunal has found that at least 3 years have passed since the non-compliance. The Tribunal accepts that hardship may be caused to the applicant and her partner if the visa is cancelled. The Tribunal accepts that hardship may be caused to Ms Keri Rafferty and her children. The Tribunal accepts that the applicant has made and continues to make a contribution to the community through her employment and volunteer work. The Tribunal accepts that the applicant has no other breaches of the law and no criminal record. These are factors that suggest that the visa should not be cancelled.
123. The Tribunal accepts that if the applicant's visa is cancelled, and unless she is granted another visa, she may be subject to detention, although the applicant may be eligible to apply for other visas.
124. The Tribunal has formed the view that Australia's international obligations would not be breached as a result of the cancellation. There are no consequential cancellations.
125. Against these considerations, the Tribunal places significant weight on the fact that the decision to grant the visa was made without the correct information because the applicant did not notify the Department of a change in her circumstances, namely that her relationship with her sponsor had ended. As noted, the Tribunal finds that the applicant's non-compliance was intentional.
126. The Tribunal has given very serious consideration to the non-compliance by the applicant in this matter. The responsibility of the Tribunal is to amplify that the situation where an applicant is not honest with the Department in order to obtain a grant of a visa, is a situation that the Tribunal should not condone.
127. The Tribunal considers the applicant's failure to notify the Department of a change in her circumstances is ultimately outweighed by the other considerations before the Tribunal, in particular, the hardship that may be caused to her and to Ms Keri Rafferty and her children. The Tribunal was impressed with the candour and spontaneity of Ms Keri Rafferty's evidence and gives this forceful weight in deciding that the visa should not be cancelled. The Tribunal also gives forceful weight to the period of time the applicant has resided in Australia and to the fact that she has not resided elsewhere in her adult life. The Tribunal also gives significant weight to the applicant's contribution to the community through her employment and volunteer work. The Tribunal has also given serious weight to the applicant's current circumstances, which include her personal circumstances, her employment and home.

128. For all these reasons, the Tribunal is of the view that despite the non-compliance, the visa in this matter should not be cancelled. The Tribunal is satisfied that on balance, the matters in favour of the applicant outweigh the other aspects in favour of cancellation.

DECISION

129. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Christine Kannis
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

104 Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
 - (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

- (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.